

# The Unconstitutionality of the Current Housing Arrangements for Intersex Prisoners

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## Introduction

Miki Ann DiMarco spent 438 days in the most restrictive and isolated housing pod at Wyoming Department of Corrections due to the fact that she was “classified as an individual of ambiguous gender.”<sup>1</sup> Even though DiMarco identified herself as female since puberty, she was segregated from the general prison population because of her gender ambiguity.<sup>2</sup> Biologically speaking, she “has a nearly complete set of male reproductive organs however [sic] does not have testicles . . . [or] female reproductive organs.”<sup>3</sup> People who are intersex, such as DiMarco, “fail to fit neatly into the traditional male/female binary construct.”<sup>4</sup> DiMarco’s case demonstrates the difficulty in determining appropriate housing arrangements in the prison system for people whose bodies do not conform to the traditional male/female dichotomy.

This Note seeks to examine the problems that arise due to the insistence upon a binary society with regards to sex. First, this Note sheds light on sex as a spectrum, rather than the classic male/female dichotomy—particularly focusing on the different conditions of intersex people. Next, this Note discusses the ways in which prison authorities house and treat intersex prisoners. The potential

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1. *DiMarco v. Wyo. Dep’t of Corr.*, 300 F. Supp. 2d 1183, 1186 (D. Wyo. 2004), *rev’d*, 473 F.3d 1334 (10th Cir. 2007).

2. *Id.* at 1187.

3. *Id.*; for purpose of this paper, I will refer to DiMarco according to her gender identification as a female.

4. JULIE A. GREENBERG, INTERSEXUALITY AND THE LAW 3 (2012).

constitutional violations of these housing classifications is analyzed with special emphasis on the DiMarco case.

Due to the lack of scholarship relating to people with intersex conditions, this section also makes comparisons to prisoners who are transsexual because they face similar challenges as intersex people. Intersex people differ from people who identify as transsexual in that intersex persons “have anatomy that is not considered typically male or female,” whereas transsexuals “have an internal experience of gender identity.”<sup>5</sup> For example, “a person who identifies as transgender or transsexual may have typical female anatomy but feel like a male and seek to become male by taking hormones or electing to have sex reassignment surgeries.”<sup>6</sup> Lastly, this Note explores the different approaches of prison systems in attempting to find a compassionate solution for housing people with intersex conditions.

In DiMarco’s case, the court analyzed her equal protection claim under rational basis review. However, this Note suggests that intersex discrimination is a form of sex discrimination. Thus, a classification differentiating intersex persons from non-intersex persons is one that merits heightened scrutiny in order to determine whether there is a violation of the equal protection clause.

### I. Difficulty in Defining Sex in a Binary Society

Sex is commonly understood as binary: either male or female. The insistence on a binary structure of sex and the separation of male and female extends beyond the housing situation in the prison system. For example, this binary structure is exemplified by the separation of males and females in sports,<sup>7</sup> public bathrooms,<sup>8</sup> and education.<sup>9</sup> States have also historically utilized one’s sex to determine the legality of a person’s marriage to another; however, many state courts are now striking down state law bans against same-sex marriage.<sup>10</sup>

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5. *What’s the Difference Between Being Transgender or Transsexual and Having an Intersex Condition?*, INTERSEX SOCIETY OF NORTH AMERICA, <http://www.isna.org/faq/transgender> (last visited Apr. 14, 2014).

6. *Id.*

7. Eric Anderson, “*I Used To Think Women Were Weak: Orthodox Masculinity, Gender Segregation, and Sport*,” *SOCIOLOGICAL FORUM* 23(2), 265 (2008).

8. Terry Kogan, *Sex Separation in Public Restrooms: Law, Architecture, and Gender*, 18 *TEMP. POL. & CIV. RTS. L. REV.* 673, 686 (2009).

9. Nancy Levit, *Embracing Segregation: The Jurisprudence of Choice and Diversity in Race and Sex Separatism in Schools*, 2005 *U. ILL. L. REV.* 455 (2005).

10. Adam Liptak, *A Steady Path to Supreme Court as Gay Marriage Gains Momentum in States*, *N.Y. TIMES*, Feb. 14, 2014, <http://www.nytimes.com/2014/02/15/us/>

The commitment to the notion that there are only two sexes is further exemplified in Western culture and language.<sup>11</sup> Most commonly, the use of pronouns such as he/she, and often words to describe relationships such as husband/wife or boyfriend/girlfriend, further the idea that sex is binary.<sup>12</sup>

Many scholars argue that sex differs from gender because sex is biological or “real,” whereas gender is constructed by society. Under this perspective, a person is born as either male or female. This person’s gender is defined by his or her masculinity or femininity, which is altered by the construction of sex in society. However, this view fails to recognize the fact that sex, like gender, is also constructed.<sup>13</sup>

The Intersex Society of North America advocates for sex as a spectrum.<sup>14</sup> Medical experts view eight characteristics as especially important in defining sex:

[G]enetic or chromosomal sex, gonadal sex (reproductive sex glands), internal morphologic sex (seminal vesicles, prostate, vagina, uterus, and fallopian tubes), external morphologic sex (genitalia), hormonal sex (androgens or estrogens), phenotypic sex (secondary sexual features such as facial hair or breasts), assigned sex and gender of rearing, and gender identity.<sup>15</sup>

Experts have estimated that “as many as 1 in every 1,500 babies is born with genitals that cannot easily be classified as male or female.”<sup>16</sup> These babies who are “born with a reproductive or sexual

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politics/a-steady-path-to-justices-as-gay-marriage-gains-momentum-in-states.html (last visited Apr. 14, 2014).

11. Anne Fausto-Sterling, *The Five Sexes: Why Male and Female are Not Enough*, THE SCIENCES, Mar.-Apr. 1993, 20–24.

12. *Definition of Terms*, GENDER EQUITY RESOURCE CENTER, [http://geneq.berkeley.edu/lgbt\\_resources\\_definiton\\_of\\_terms](http://geneq.berkeley.edu/lgbt_resources_definiton_of_terms) (last visited Apr. 10, 2014).

13. ANNE FAUSTO-STERLING, *SEXING THE BODY: GENDER POLITICS AND THE CONSTRUCTION OF SEXUALITY* 27 (2000).

14. *What is intersex?*, INTERSEX SOCIETY OF NORTH AMERICA, [http://www.isna.org/faq/what\\_is\\_intersex](http://www.isna.org/faq/what_is_intersex) (last visited Feb. 18, 2014).

15. See GREENBERG, *supra* note 4, at 11.

16. *Answers to Your Questions About Individuals with Intersex Conditions*, AMERICAN PSYCHOLOGICAL ASSOCIATION, <https://www.apa.org/topics/lgbt/intersex.pdf> (last visited Apr. 14, 2014).

anatomy that doesn't seem to fit the typical definitions of female or male" are said to have an intersex condition.<sup>17</sup>

Experts still debate which conditions should actually qualify as intersex conditions. However, some arguably common types of intersexuality are "congenital adrenal hyperplasia ("CAH"), androgen insensitivity syndrome ("AIS"), gonadal dysgenesis, hypospadias, and unusual chromosome compositions such as XXY (Klinefelter Syndrome) or XO (Turner Syndrome)."<sup>18</sup> For example, "[i]n XX children, [CAH] can cause mild to severe masculinization of genitalia at birth or later."<sup>19</sup> Conversely, AIS affects XY children causing highly feminized genitalia.<sup>20</sup> In that case, "the body is 'blind' to the presence of testosterone, since cells cannot capture it and use it to move development in a male direction."<sup>21</sup> At puberty these children develop breasts and a feminine body shape."<sup>22</sup> Gonadal dysgenesis is a condition that "[r]efers to individuals (mostly XY) whose gonads do not develop properly."<sup>23</sup>

The pressure to maintain the binary sex structure, combined with the subjective nature of sex, forces intersex people to transform into male or female.<sup>24</sup> In the 1950s, surgeons began to "[treat]" people born with ambiguous genitalia by "surgical alteration of 'unacceptable' genitalia into 'normal' genitalia."<sup>25</sup> In essence, doctors chose the sex of a child by physically transforming the body into society's vision of male or female. Sex is still assigned on the basis of the baby's genitals.<sup>26</sup> However, when the genitals are ambiguous, doctors today conduct tests including "karyotyping and chromosomal analysis; serum electrolyte, hormone, and steroid evaluation; ultrasound; laparoscopy; renal imaging; and a genitogram, a form of x-ray examination that uses a dye to reveal the structure of the internal genitals."<sup>27</sup> After the tests, most doctors convey the results to

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17. *Definition of Terms*, *supra* note 12.

18. FAUSTO-STERLING, *supra* note 13, at 51.

19. *Id.* at 52.

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. Noa Ben-Asher, *The Necessity of Sex Change: A Struggle for Intersex and Transsex Liberties*, 29 HARV. J.L. & GENDER 51, 53 (2006); see GREENBERG, *supra* note 4, at 16.

25. GREENBERG, *supra* note 4, at 16.

26. KATRINA KARKAZIS, *FIXING SEX: INTERSEX, MEDICAL AUTHORITY, AND LIVED EXPERIENCE* 95 (2008).

27. *Id.* at 97.

the baby's parents, and offer recommendations to them allowing them to choose their baby's sex assignment.<sup>28</sup> However, only a minority of doctors believe it is their responsibility to choose the sex assignment for the baby based on their medical expertise.<sup>29</sup>

The Intersex Society of North America ("ISNA") argues that surgery is not the proper treatment for intersex people.<sup>30</sup> While ISNA views surgery as an improper coping mechanism for parents with intersex children, it recommends gender assignment as a boy or a girl when the baby is born.<sup>31</sup> Under this perspective, surgery is only encouraged if it is medically necessary for the physical health of the child.<sup>32</sup> If the surgery is for the sole purpose of cosmetics, then ISNA advocates for the postponement of surgery until the "child is mature enough to make an informed decision for herself or himself."<sup>33</sup>

Today, many experts agree with ISNA in challenging the traditional surgical treatment to intersexuality.<sup>34</sup> They argue that surgically choosing sex assignment at birth could be extremely harmful if the "child's gender identity did not develop in conformity with surgically created genitalia."<sup>35</sup> Secondly, many intersex adults who have undergone cosmetic genetic surgery face a series of uncomfortable side effects including "loss or diminishment of erotic response, genital pain or discomfort, infections, scarring, urinary incontinence, and cosmetically unacceptable genitalia."<sup>36</sup> Lastly, they criticize the fact that the decision to perform surgery on the baby is often "based on half truths and secrecy . . ."<sup>37</sup> As a result, these surgeries reinforce the need of binary sex and the shame felt by people who do not conform to the binary norm.<sup>38</sup>

ISNA advocates for a strong support system for children and adults with intersex conditions.<sup>39</sup> For example, intersex people should be provided with trained psychologists, and if possible, an

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28. *Id.* at 127.

29. *Id.*

30. *What does ISNA recommend for children with intersex?*, INTERSEX SOCIETY OF NORTH AMERICA, <http://www.isna.org/faq/patient-centered> (last visited Mar. 7, 2014) ("Parents' distress must not be treated by surgery on the child.").

31. *Id.*

32. *Id.*

33. *Id.*

34. See GREENBERG, *supra* note 4, at 18.

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. *What does ISNA recommend for children with intersex?*, *supra* note 30.

opportunity to connect with other people undergoing similar situations.<sup>40</sup> Parents should be open with their children about their condition and try to create a comfortable environment where children will not feel shamed or stigmatized for their condition.<sup>41</sup>

## II. Current Housing Arrangements for Intersex Persons in Prisons

States have consistently separated males and females in prison.<sup>42</sup> For example, the California Penal Code (“CPC”) acknowledges sex segregation in the prison system.<sup>43</sup> However, the CPC fails to define what constitutes male and female.<sup>44</sup> The CPC provides no guidance to prison guards who are faced with prisoners whose bodies do not fit into the classic male or female model. Further, it perpetuates the misguided assumption that sex is binary by only referencing two institutions for men and women.

The federal penal and correctional institutions explicitly state that classification is based on “the nature of the offenses committed, the character and mental condition of the prisoners, and such other factors as should be considered in providing an individualized system of discipline, care and treatment of the persons committed to such institutions.”<sup>45</sup> Similar to the CPC, the United States Code does not reference the separation of male and female explicitly. However, United States Code includes a separate section for the Institutions for Women, which insinuates that there is separation between males and females in the federal prison system as well.<sup>46</sup>

Thus, the federal and state governments both mandate sex segregation in the prison system, but define segregation in different ways. For example, these laws may vary in “segregating the inmate population of an entire state’s penal system to the jails of particular localities to specifically applying to cells, rooms, apartments, bathing facilities, work opportunities, bathroom showers, educational and recreational programs, drug and alcohol rehab programs, death row, waiting areas pre-trial and chain gangs.”<sup>47</sup> Another example is that

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40. *Id.*

41. *Id.*

42. CAL. PENAL CODE § 2000-3200.

43. *Id.*

44. *Id.*

45. 18 U.S.C. § 4081 (2014).

46. 18 U.S.C. § 4321 (2014).

47. David S. Cohen, *The Stubborn Persistence of Sex Segregation*, 20 COLUM. J. GENDER & L. 51, 79–80 (2011).

some low security prisoners are held in co-correctional federal prisons.<sup>48</sup> These facilities still house males and females separately, but allow the prisoners to participate in certain programs and activities together.<sup>49</sup>

The most common justification for segregation on the basis of sex in the prison system is prison security. More specifically, the government has an incentive to segregate women from men because of the dangers of “rape, prostitution, and pregnancies, and the potential exploitation of outnumbered women in desegregated prisons.”<sup>50</sup>

However, research has shown that sex segregation in the prison system places a burden on female prisoners.<sup>51</sup> For example, prisons offer inferior programs and services to women compared to those offered to men.<sup>52</sup> Moreover, some have argued that segregation causes stigmatization based on the perceived moral weakness of women.<sup>53</sup>

In addition to criticism towards sex segregation on the basis that it unduly burdens females, it also perpetuates the stereotype that sex is binary:

When law or society tells people that a place or activity is reserved for men alone, or, conversely, that men are excluded from a particular place or activity, two important messages are sent: one, that there are distinct categories of people based on reproductive anatomy and that these anatomical distinctions are a legitimate way of organizing and sorting people; and two, that people with the reproductive anatomy labeled “male” are supposed to behave in a certain way.<sup>54</sup>

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48. Rosemary Herbert, *Women's Prisons: An Equal Protection Evaluation*, 94 YALE L.J. 1182, 1185 (1985).

49. *Id.*

50. Jennifer Arnett Lee, Note, *Women Prisoners, Penological Interests, and Gender Stereotyping: An Application of Equal Protection Norms to Female Inmates*, 32 COLUM. HUM. RTS. L. REV. 251, 259–60 (2000).

51. See Herbert, *supra* note 48, at 1192.

52. *Id.* at 1193.

53. *Id.* at 1192–93.

54. David Cohen, *Keeping Men “Men” and Women Down: Sex Segregation, Anti-Essentialism, and Masculinity*, 33 HARV. J.L. & GENDER 509, 511 (2010).

The problem arises because not every person fits into the distinct cookie cutter male or female body.

Prison authorities, rather than the prisoner, determine the sex of that particular prisoner.<sup>55</sup> The sentencing judge reads the presentence report to learn more about the prisoner.<sup>56</sup> These reports will sometimes explain beyond the mere classification of male or female, if gender issues are implicated.<sup>57</sup>

Most facilities assign housing on “the basis of the appearance of their genitalia.”<sup>58</sup> However, these prison systems “do not have written policies addressing how to determine where sex and gender nonconforming prisoners should be housed.”<sup>59</sup> Typically, these prison officials will seek a medical recommendation.<sup>60</sup> Yet without written policies, prison officials and medical advisors have significant discretion in determining where to house an intersex person. Consequently, intersex prisoners may be placed in a facility that differs from their gender self-identity.<sup>61</sup>

Prison authorities will also isolate prisoners if they need time to determine the sex of a prisoner.<sup>62</sup> Not only have prison authorities housed a person in confinement temporarily while determining the person’s sex, but they have also chosen to isolate a person from the entire population if they fear safety is at stake.<sup>63</sup> These protective custody units are often criticized as being too isolating from the general population. However, prison authorities seem more focused on removing the vulnerable party from the dangerous situation, rather than seeking to create a less hostile environment. Prison officials “recognize that placing a self-identified female with ambiguous or male genitalia in the male population is dangerous, but they typically will refuse to place her in the female population, even if

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55. Darren Rosenblum, “Trapped” in *Sing Sing: Transgendered Prisoners Caught in Gender Binarism*, 6 MICH. J. GENDER & L. 499, 517.

56. *Id.* at 520.

57. *Id.*

58. See GREENBERG, *supra* note 4, at 77.

59. *Id.*

60. Donald Leach, *Managing Lesbian, Gay, Bisexual, Transgender, and Intersex Inmates: Is Your Jail Ready?*, NATIONAL INSTITUTE OF CORRECTIONS: NATIONAL JAIL EXCHANGE (Jan. 25, 2011, 4:02 PM), [http://community.nicic.gov/blogs/national\\_jail\\_exchange/archive/2011/01/25/managing-lesbian-gay-bisexual-transgender-and-intersex-inmates-is-your-jail-ready.aspx](http://community.nicic.gov/blogs/national_jail_exchange/archive/2011/01/25/managing-lesbian-gay-bisexual-transgender-and-intersex-inmates-is-your-jail-ready.aspx).

61. See GREENBERG, *supra* note 4, at 77.

62. Rosenblum, *supra* note 55, at 503.

63. See GREENBERG, *supra* note 4, at 77.



there is no indication that such placement would lead to sexual abuse of another female inmate.”<sup>64</sup>

### **III. Constitutional Challenges to the Prison Housing Arrangements for People with Intersex Conditions**

The Supreme Court has stated: “Prison walls do not form a barrier separating prison inmates from the protections of the Constitution.”<sup>65</sup> The Constitution imposes a minimum standard in regards to the treatment of prisoners. For example, the Eighth Amendment states that “excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”<sup>66</sup> In addition to the Eighth Amendment, the Fourteenth Amendment states that “no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”<sup>67</sup>

Discrepancies regarding the sex of intersex prisoners have called into question the constitutionality of prison authorities’ housing choices for these people. This section discusses two issues relating to the placement of intersex prisoners. First, it analyzes the treatment of intersex prisoners who are housed in conformity with their gender identity. Then, this section examines the problematic treatment of intersex prisoners who are not housed in conformity with their gender identity.

Prison authorities often find there are legitimate reasons for segregating intersex prisoners from the general population.<sup>68</sup> When prison authorities fear that housing in the general population would be a high risk for the intersex person or the other prisoners, protective custody is often implemented.<sup>69</sup> Protective custody is typically offered to high-risk prisoners with an option to waive out of

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64. *Id.*

65. *Turner v. Safley*, 482 U.S. 78, 84 (1987).

66. U.S. CONST. amend. VIII.

67. U.S. CONST. amend. XIV.

68. Donald Leach, *Managing Lesbian, Gay, Bisexual, Transgender, and Intersex Inmates: Is Your Jail Ready?*, NATIONAL INSTITUTE OF CORRECTIONS: NATIONAL JAIL EXCHANGE (Jan. 2011), [http://community.nicic.gov/blogs/national\\_jail\\_exchange/archive/2011/01/25/managing-lesbian-gay-bisexual-transgender-and-intersex-inmates-is-your-jail-ready.aspx](http://community.nicic.gov/blogs/national_jail_exchange/archive/2011/01/25/managing-lesbian-gay-bisexual-transgender-and-intersex-inmates-is-your-jail-ready.aspx).

69. *Id.*

the custody.<sup>70</sup> Prisons differ in their treatment of persons in protective custody, varying in the level of safety, “sometimes providing a safe refuge from the violence of other prisoners, while other times isolating prisoners, and thereby placing them at a greater risk of violence at the hands of correctional officers.”<sup>71</sup>

Prisoners have been critical of protective custody as being too restrictive and less protective in terms of violence from prison guards.<sup>72</sup> Many prisoners have found that the status of protective custody prevents them from taking full advantage of some of the self-improvement programs that the prisons provide.<sup>73</sup> Additionally, the extreme privacy of protective custody in many prisons exposes these prisoners to new challenges. For example,

Bianca, an SRLP client who is currently imprisoned in general population and pursuing litigation in connection with incidents in which she was raped by correctional officers, observes, “[Protective custody] is even worse cause there are no cameras.” For Bianca, placement in protective custody would mean less opportunity to document an ongoing pattern of abuse she experiences. Another interviewee reports, “I’ve spent 95% of my time in [protective custody] where there are no programs,” highlighting the negative impacts of denying educational, rehabilitative, and vocational programming to those housed in protective custody units.<sup>74</sup>

The isolative nature of protective custody has made it an undesirable alternative in the eyes of many prisoners.<sup>75</sup>

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70. *Id.*

71. The Sylvia Rivera Law Project (“SRLP”) is an organization that “works to guarantee that all people are free to self-determine gender identity and expression, regardless of income or race, and without facing harassment, discrimination, or violence.” *See, e.g.*, THE SYLVIA RIVERA LAW PROJECT, “IT’S WAR IN HERE”: A REPORT ON THE TREATMENT OF TRANSGENDER AND INTERSEX PEOPLE IN NEW YORK STATE MEN’S PRISONS 6,18 (2007), available at <http://srlp.org/files/warinhere.pdf>. This project reports the experiences of SRLP’s clients in New York State Prisons. *Id.* The report is meant to educate others on the injustices faced by SRLP clients, and help create policies that would improve the conditions for these people. *Id.*

72. *Id.* at 18.

73. *Id.*

74. *Id.*

75. *Id.* at 19.

Miki Ann DiMarco challenged her prison housing conditions as violative of the Eighth Amendment, due process under the Fourteenth Amendment, substantive due process under the Ninth and Fourteenth Amendments, the Wyoming Constitution, and under a Section 1983 equal protection claim.<sup>76</sup> DiMarco is a person with an intersex condition because she is

closer to being a hermaphrodite than either a male or female. Plaintiff has a nearly complete set of male reproductive organs however does not have testicles. Plaintiff has no female reproductive organs. Plaintiff has lived as a female since puberty and identifies herself as being of female gender.<sup>77</sup>

Initially, she was housed with the female population in the Laramie County Jail for thirty-eight days, and had no reported issues with any of the other female inmates.<sup>78</sup> DiMarco was then transferred to Wyoming Women's Center ("WWC").<sup>79</sup> Her sex was questioned after a nurse conducted a physical search and noted that DiMarco had a penis.<sup>80</sup>

While it is customary for new inmates to be segregated from the general population during the housing classification process, DiMarco was "segregated from the general population throughout her incarceration, a total of 438 days, from May 2, 2000 to July 10, 2001."<sup>81</sup>

DiMarco was housed in the "most restrictive and isolated housing pod," which is used "to segregate serious offenders for punishment."<sup>82</sup> She was placed in this pod because of the mere fact of her ambiguous sex and physical characteristics. As a result, she was denied the following privileges that were afforded to prisoners who committed similar offenses:

[A]ny human contact with fellow inmates, working for pay, access to the general population day room, access to the cafeteria or commissary, access to inmate educational advantages, and a hair cut. Plaintiff was

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76. *DiMarco*, 300 F. Supp. 2d at 1185.

77. *Id.* at 1186–87.

78. *Id.* at 1187.

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

required to eat all meals in her cell which did not have a table or chair so she was constrained to sit on her bed or toilet to eat. Plaintiff was allowed out of her cell and into the Pod 3 day room a maximum of five and one-half hours a day. Plaintiff was not allowed to have everyday possessions which were allowed in minimum and even in certain East wing pods (Pods 1 and 2) such as jewelry, make up, hair pick, tweezers, nail clippers, mirror, facial tissue, colored pencils, hobby craft, religious items, cassette tapes or player, calculator, clock, clock radio, lamp, television, Walkman cassette, hair dryer, and thermal top or bottoms. (Ex. 42).<sup>83</sup>

While DiMarco was housed according to her gender identity, she was treated differently from the other prisoners only because of the fact that her body differed from other female prisoners.

In regards to DiMarco's Eighth Amendment claim, the District Court denied her claim for relief. Past decisions have established a high burden of proof for a plaintiff to establish that conditions violate the Eighth Amendment.<sup>84</sup> Since DiMarco was not denied basic necessities, the court rejected her Eighth Amendment claim.<sup>85</sup> The Court did note that the prison staff "could have originated a better living situation for Plaintiff," acknowledging that there are other unexplored options that the prison could have considered when determining her housing situation.<sup>86</sup>

At the District Court level, DiMarco prevailed on her claim regarding violation of her due process rights.<sup>87</sup> The court emphasized its concern that DiMarco was not afforded a hearing that would have given her the opportunity to contest her housing situation.<sup>88</sup> The court also acknowledged that she was treated differently on the basis of an immutable characteristic that she had no control over.<sup>89</sup> The court reasoned that continuing the segregated confinement in the "starkest, barest, most severe conditions, when she had violated no

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83. *Id.* at 1188.

84. *Id.* at 1192 ("[J]ail conditions may be 'restrictive and even harsh' without violating constitutional rights.").

85. *Id.* at 1194.

86. *Id.*

87. *Id.* at 1995.

88. *Id.* at 1194–95.

89. *Id.* at 1195.

prison rules was not fair.”<sup>90</sup> While the court recognized that placing DiMarco in segregated housing was necessary initially, it found that the prison should have “develop[ed] other more respectable, less harsh alternatives for Plaintiff” during her 438 days of confinement.

However, on appeal, the Tenth Circuit reversed the District Court’s holding regarding the only claim that DiMarco prevailed.<sup>91</sup> The Tenth Circuit found that her conditions were not so burdensome and did not deviate from the norm to the point where it would violate the due process clause of the Constitution.<sup>92</sup> Additionally, the Tenth Circuit found that even though she was not allowed to present witnesses or have a proper hearing, due process was still satisfied because the prison authorities took other measures of review that were adequate to satisfy due process.<sup>93</sup>

The appellate decision took away intersex prisoners’ procedural due process right to participate in classification hearings. In essence, the court denied intersex prisoners ability to voice their opinion regarding their housing classification. This wrongly prioritizes the opinion of medical experts and prison guards over the interest an intersex person has in regards to their own housing assignment in accord with their gender self-identification.

Scholarship has found that the government needs to recognize a person’s ability to self-identify gender because it is a liberty interest:

What is closer to the “heart of liberty” and more “central to personal dignity and autonomy” than an individual’s chosen gender identity—to be granted full legal rights and protection against discrimination even if one does not fall into one of two neat societal boxes labeled male or female. Undoubtedly, the right to identify beyond the fixed male-female gender binary should not be tainted by state compulsion.<sup>94</sup>

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90. *Id.*

91. *DiMarco*, 473 F.3d at 1345.

92. *Id.*

93. *Id.*

94. Scholar Jennifer Rellis bases this liberty interest on the court’s holding from *Lawrence v. Texas*, 539 U.S. 558 (2003): “The most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could define the attributes of personhood were they formed under compulsion of the State.” See, e.g., Jennifer Rellis, “Please write ‘E’ in this box” *Toward Self-Identification and Recognition of a Third Gender: Approaches in the United States and India*, 14 MICH. J. GENDER & L. 223, 257–58 (2007).

These classifications based on gender identification merit heightened scrutiny from the courts because of this recognized liberty interest. Thus, the sex-based classification in *DiMarco* implicated a due process liberty claim.

The District Court also denied DiMarco's Fourteenth Amendment equal protection claim.<sup>95</sup> The District Court applied a rational basis test to determine if the prison officials housing classification and subsequent treatment of DiMarco "[bore] a rational relation to a legitimate state purpose."<sup>96</sup> The purpose of DiMarco's segregated confinement was for the safety and security of DiMarco and the other inmates. The court found that the prison's housing classification of DiMarco was rationally related to a legitimate state purpose.<sup>97</sup>

While the court rejected DiMarco's claim that she should be recognized as part of a quasi-suspect class, the level of scrutiny attributed to persons with intersex conditions merits further discussion. Past precedent has not explicitly established that people with intersex conditions are members of a quasi-suspect class for purpose of Fourteenth Amendment equal protection analysis. Further, the District Court in DiMarco's case found that it was not provided adequate proof that Plaintiff "was saddled with a disability, or is a member of a group which has been subjected to a history of purposeful unequal treatment, or is in such a position of political powerlessness to command extraordinary protection" as to demand a more stringent level of review.<sup>98</sup> The District Court did not explicitly deny that intersexuality should be analyzed under heightened scrutiny, but rather pointed out that there was simply not sufficient evidence brought forward by DiMarco in this case.<sup>99</sup>

#### **IV. Equal Protection Claims: Heightened Standard of Review for Sex Classifications Affecting Intersex Persons**

Even though past cases have not addressed the standard of review that should be applied for people with intersex conditions, a myriad of courts have examined the standard of review for equal protection claims relating to sex more generally. For example, in

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95. *DiMarco*, 300 F. Supp. 2d at 1197.

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

*Frontiero v. Richardson*,<sup>100</sup> female military personnel challenged a federal law that required different standards for male and female military personnel in order to obtain benefits.<sup>101</sup> The plurality in that case applied strict scrutiny to analyze the sex classification.<sup>102</sup> The *Frontiero* Court relied upon the long-standing history of sex discrimination as a factor in determining that a heightened scrutiny was necessary for classifications based on sex.<sup>103</sup>

A majority of the Supreme Court first applied a higher standard than rational basis to gender classifications in 1976 in *Craig v. Boren*.<sup>104</sup> In that case, the plaintiff challenged an Oklahoma law that established different age requirements for men and women to buy 3.2% beer.<sup>105</sup> The Court stated that for a gender classification to survive an equal protection challenge, it must “serve important governmental objectives and must be substantially related to achievement of those objectives.”<sup>106</sup> In so holding, the Court created an intermediate standard of scrutiny for sex and gender classifications.<sup>107</sup>

Courts have acknowledged that the immutability of the class, the history of discrimination, and the lack of political power are all factors in determining heightened scrutiny.<sup>108</sup> While courts have not held that intersexuality is a class that merits heightened scrutiny, the factors necessary for heightened scrutiny exist in the case of intersexuality.<sup>109</sup>

Intersexuality is an immutable characteristic because it is something that people are born with. While some people do not show signs of intersexuality until later in life, it is still an immutable characteristic because it is something that people have no control over.

Secondly, intersex persons face discrimination. For example, “doctors often perform ‘corrective’ surgery tantamount to genital

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100. *Frontiero v. Richardson*, 411 U.S. 677, 678 (1973).

101. *Id.*

102. *Id.* at 688.

103. *Id.* at 684.

104. *Craig v. Boren*, 429 U.S. 190, 197 (1976).

105. *Id.* at 192.

106. *Id.* at 197.

107. Ajmel Quereshi, *The Forgotten Remedy: A Legal and Theoretical Defense of Intermediate Scrutiny for Gender-based Affirmative Action Programs*, 21 AM. U. J. GENDER SOC. POL'Y & L. 797, 803 (2012).

108. *Varnum v. Brien*, 763 N.W.2d 862, 887–88 (2009).

109. Jessica L. Adair, *In a League of Their Own: The Case for Intersex Athletes*, 18 SPORTS LAW. J. 121, 142–43 (2011).

mutilation on intersex infants if their genitals appear outwardly abnormal.”<sup>110</sup> This surgery is typically performed for cosmetic reasons, rather than medically necessary reasons, and often has severe side effects.<sup>111</sup>

Lastly, intersex persons lack political power, which is exemplified by the fact that, for instance, DiMarco did not even have the opportunity to voice her opinion in her housing assignment.<sup>112</sup> Further, the court found that she did not have that procedural due process right.<sup>113</sup> DiMarco’s case has been recognized as one of the few cases where the United States judicial system actually addressed issues arising with people with intersex conditions:

Within the United States, the legal system still does not provide any protected legal status to intersex persons . . . . Despite her intersex status being a seemingly vital aspect of the decision to confine DiMarco, the case did not specifically address DiMarco’s rights as an intersex individual, leaving the intersex community uncertain about its legal status in the United States.”<sup>114</sup>

The lack of legal guidelines relating to people with intersex conditions could be attributed to the fact that they represent a minority of the population. For example, in the Wyoming prison, the prison authorities had never encountered a situation such as DiMarco’s before: “As all witnesses stated during the trial, no one has been presented with a similar situation, including Dr. Helman, Plaintiff’s expert witness who had 27 years in the federal prison experience.”<sup>115</sup> The lack of awareness of these conditions sheds light into why this group of people has fallen through the cracks of the prison rules and legal protections more generally.

Thus, similar to sex and race, intersexuality is an immutable characteristic, with a history of past discrimination, and lack of political power. The presence of all these factors provides a solid basis for intersexuality as a classification to merit heightened scrutiny.

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110. *Id.* at 143.

111. *See* GREENBERG, *supra* note 4, at 18.

112. *DiMarco*, 473 F.3d at 1345.

113. *Id.*

114. Yamuna Menon, *The Intersex Community and the Americans with Disabilities Act*, 43 CONN. L. REV. 1221, 1232–33 (2010).

115. *DiMarco*, 300 F. Supp. 2d at 1193.



While precedent has not established that an intersex person is explicitly part of a suspect class, it has been consistently held that classifications on the basis of sex merit a heightened form of scrutiny.<sup>116</sup> Similarly, the factors that have warranted heightened scrutiny in other classifications such as race or sex also apply to intersexuality as a class. When prisons choose to house a person with an intersex condition in segregated housing, they make a distinction based on the person's sex. DiMarco was separated from the other women only because of her sex and physical characteristics.<sup>117</sup> The District Court in *DiMarco* did not acknowledge this classification as one that was based on sex. Moreover, it only provided a cursory explanation of the rationale behind applying rational basis review to the prison's treatment of DiMarco.<sup>118</sup>

Historically, courts have been more inclined to uphold sex classifications as substantially related to important governmental objectives when the classifications are based on real biological differences.<sup>119</sup> For example, in *Nguyen v. Immigration and Naturalization Service*,<sup>120</sup> a federal statute imposed different citizenship requirements for children of unmarried fathers and unmarried mothers.<sup>121</sup> The Court's decision hinged on the biological differences in terms of sexual reproduction between males and females.<sup>122</sup> While a son's biological relationship to his father may be uncertain, his relationship to her mother is "verifiable from the birth itself" and "is documented in most instances by the birth certificate or hospital records and the witnesses who attest to her having given birth."<sup>123</sup> The Court thus upheld this federal statute, reasoning that there are significant biological differences between mothers and fathers that merit different statutory requirements.<sup>124</sup>

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116. *Frontiero*, 411 U.S. at 688; *Craig*, 429 U.S. at 197 (1976); *J.E.B. v. Ala. ex rel. T.B.*, 511 U.S. 127, 135 (1994).

117. *DiMarco*, 300 F. Supp. 2d. at 1188.

118. *See DiMarco*, 300 F. Supp. 2d at 1197 (stating that "[p]laintiff claims that individuals born with ambiguous gender are members of a quasi-suspect class. However, there has been no proof of a recognized quasi-suspect class presented to this Court and therefore this Court will not place Plaintiff in a constitutionally protected class.").

119. *Nguyen v. INS*, 533 U.S. 53 (2001); *see also Michael M. v. Super. Ct. of Sonoma Cnty.*, 450 U.S. 464 (1981) (holding that a California law that aimed to protect females against statutory rape was constitutional because of the real biological differences between males and females).

120. *Nguyen*, 533 U.S. at 56.

121. *Id.*

122. *Id.* at 73.

123. *Id.* at 62.

124. *Id.* at 73.

If the sex classification is based on a stereotype, then courts are not likely to find that the classification is an important government interest.<sup>125</sup> For example, in *United States v. Virginia*,<sup>126</sup> Virginia Military Institute (“VMI”) excluded women from attending its school.<sup>127</sup> VMI was a prestigious school, known for its leadership training, strong alumni network, and unique “adversative method” of learning.<sup>128</sup> Furthermore, the district court acknowledged that “women are [indeed] denied a unique educational opportunity that is available only at VMI.”<sup>129</sup> The Court found that VMI’s exclusion of women violated the Constitution’s equal protection guarantee, because it was based entirely on gender stereotypes and generalizations about women.<sup>130</sup>

Intersexuality challenges the traditional male/female dichotomy because it suggests that sex is a spectrum. If the very nature of sex is socially constructed, then classifications that are based on sex are not based on real biological differences. Specifically, prison sex classifications and housing assignments are based on societal constructions of sex and broad generalizations of the differences between male and females. In light of precedent, these prison classifications should not be upheld if sex truly is a spectrum.

Additionally, courts have found that gender non-conformity is a form of sex discrimination under Title VII of the Civil Rights Act.<sup>131</sup> If an employer penalizes an employee for not conforming to gender stereotypes, that employer violated Title VII because he discriminated on the basis of sex.<sup>132</sup> For example, employers cannot punish a male employee for being too “feminine.” In *Price Waterhouse v. Hopkins*,<sup>133</sup> an employer penalized a female employee because she failed to conform to feminine stereotypes:

One partner described her as “macho” (Defendant’s Exh. 30); another suggested that she “overcompensated for being a woman” (Defendant’s

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125. *United States v. Virginia*, 518 U.S. 515 (1996); *Miss. Univ. for Women v. Hogan*, 458 U.S. 718 (1982); *Califano v. Goldfarb*, 430 U.S. 199 (1976).

126. *Virginia*, 518 U.S. at 520.

127. *Id.*

128. *Id.*

129. *Id.* at 524.

130. *Id.* at 550–51.

131. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989).

132. *Id.*

133. *Id.*

Exh. 31); a third advised her to take “a course at charm school” (Defendant’s Exh. 27). Several partners criticized her use of profanity; in response, one partner suggested that those partners objected to her swearing only “because it’s a lady using foul language” (Tr. 321).<sup>134</sup>

The Court concluded that if an employer acts on a sex stereotype, this constitutes an adverse employment action.<sup>135</sup> Thus, sex discrimination in the context of Title VII includes negative treatment based on gender non-conformity.

The sex stereotyping theory developed in Title VII cases has also been applied in equal protection cases.<sup>136</sup> In *Glenn v. Brumby*,<sup>137</sup> the plaintiff was diagnosed with Gender Identity Disorder and told her supervisors that she intended to surgically change from male to female.<sup>138</sup> As a result, her supervisor fired her because “gender transition surgery and presentation as a woman in the workplace would be seen as immoral . . . and would make other employees uncomfortable.”<sup>139</sup> The court used the *Price Waterhouse* sex-stereotyping framework to reason that “while ‘transsexuals’ are not members of a protected class based on sex, those who do not conform to gender stereotypes are members of a protected class based on sex.”<sup>140</sup> The court dismissed defendant’s motion to dismiss, and concluded that the plaintiff “sufficiently pleaded claims of sex stereotyping and gender discrimination.”<sup>141</sup>

Like transsexual persons, intersex persons face discrimination on the basis of gender non-conformity. Intersex persons do not conform to the traditional male-female dichotomy. *Price Waterhouse* and *Glenn* provide the appropriate framework for intersex prisoners to bring claims of sex discrimination based on gender non-conformity.

Courts have been willing to expand discrimination on the basis of sex to also include sexual orientation claims as sex discrimination claim. For example, in *Oncale v. Sundowner Offshore Services*,<sup>142</sup>

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134. *Id.* at 235.

135. *Id.* at 251.

136. *Glenn v. Brumby*, 632 F. Supp. 2d 1308 (2009).

137. *Id.*

138. *Id.* at 1311.

139. *Id.* at 1311–12.

140. *Glenn*, 632 F. Supp. 2d at 1315.

141. *Id.* at 1316.

142. *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 77 (1998).

male employees “physically assaulted” in a “sexual manner” their male co-worker.<sup>143</sup> The Court found that a plaintiff could sue for discrimination on the basis of sex under Title VII for experiencing same sex sexual harassment.<sup>144</sup> The *Oncale* Court also acknowledged other atypical circumstances that would amount to sex discrimination.<sup>145</sup> The Court argued for an expansive reading of sex discrimination, explaining that “statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.”<sup>146</sup>

Viewing sex as a spectrum suggests that sex, like race, is a social construct. Thus, on its face, a sex-based classification is involved whenever the government penalizes a person for their sex or gender nonconformity.

The effect and intent of preserving the binary sex system is to perpetuate male supremacy.<sup>147</sup> Contemporary resistance to any deviation from the binary system stems from traditional notions of family and the patriarchal paradigm.<sup>148</sup> The insistence on preserving the male female dichotomy is based on the incorrect assumption that “erotic attraction . . . depends upon sharp gender differentiation. Thus, passion and family stability depends on the maintenance of gender differentiation.”<sup>149</sup> Intersexuality and the principle that sex is a spectrum runs counter to this traditional norm. These patriarchal arrangements stigmatize persons who do not fit into the typical male or female mold.

Precedents of expansive reading of sex discrimination support heightened scrutiny for intersex victims facing sex discrimination. Prison officials who treat intersex prisoners differently merely because of their physical anatomy are doing so essentially because

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143. *Id.*

144. *Id.* at 82.

145. *Id.* at 80–81 (observing that an inference of sex discrimination can be drawn from same sex harassment when “there is credible evidence that the harasser was homosexual, [ . . . ] if a female victim is harassed in such sex-specific and derogatory terms by another woman as to make it clear that the harasser is motivated by general hostility to the presence of women in the workplace, [ . . . ] [or there is] direct comparative evidence about how the alleged harasser treated members of both sexes in a mixed-sex workplace.”).

146. *Id.* at 79.

147. Bennett Capers, Note, *Sex(ual Orientation) and Title VII*, 91 COLUM. L. REV. 1158, 1163 (1991).

148. Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. 187, 220 (1988).

149. *Id.*

they are making a determination based on their sex. Thus, discrimination towards intersex prison victims, such as DiMarco, merits heightened scrutiny.

Moreover, the act of sex and gender classification is itself a form of sex discrimination. If sex/gender is a social construct and the purpose of sex discrimination doctrine is to invalidate those sex/gender classifications that are based upon stereotypes, then any classification based on sex/gender is likely to constitute discrimination on the basis of sex. The Court in *Virginia* already motioned towards this with its requirement that the “gender-based government action must demonstrate an ‘exceedingly persuasive justification’ for that action.”<sup>150</sup> The Court’s assertion of the “exceedingly persuasive” standard suggests that whenever sex segregation exists, the parties involved may have trouble maintaining the policy in a manner that is consistent with the Constitution.

### **V. Cruel and Unusual Punishment: Application of the *Farmer* Standard to Intersex Persons**

Prison authorities often place intersex prisoners into housing that does not conform with their gender identity. As a result of these inconsistencies between housing assignments and gender identity among the prisoners with an intersex condition, many of these prisoners face violence or sexual abuse.<sup>151</sup> Specifically, “prisoners with a female identity and ambiguous or male appearing genitalia” placed in male housing are at serious risk of facing abuse.<sup>152</sup>

Additionally, it has been reported that many people with intersex conditions report humiliation by repeated strip searches.<sup>153</sup> The staff conducts “repeated, unjustified strip searches for the purpose of satisfying curiosity about the person’s body, humiliating the person, or the sexual arousal of the guard.”<sup>154</sup> These searches are often done in public settings, which highlights the differences in the person’s body to the other inmates making that intersex prisoner even more of a target.<sup>155</sup>

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150. *Virginia*, 518 U.S. at 531.

151. See GREENBERG, *supra* note 4, at 77.

152. *Id.*

153. THE SYLVIA RIVERA LAW PROJECT, *supra* note 71, at 22.

154. Gabriel Arkles, *Safety and Solidarity Across Gender Lines: Rethinking Segregation of Transgender People in Detention*, 18 TEMP. POL. & CIV. RTS. L. REV. 515, 527 (2009).

155. *Id.*

While there have not been any constitutional challenges regarding intersex prisoners placed in housing contrary to their gender identity, intersex prisoners face relatable problems as transsexual prisoners.<sup>156</sup> Precedent has established that prison officials violate the Eighth Amendment if there is “‘deliberate indifference’ to a substantial risk of serious harm to an inmate.”<sup>157</sup>

In *Farmer v. Brennan*,<sup>158</sup> a prisoner, Dee Farmer, sued a federal prison for violation of “the Eight Amendment by their deliberate indifference to petitioner’s safety.”<sup>159</sup> The prisoner in that case is a transsexual person: “biologically male, wore women’s clothing (as petitioner did at the 1986 trial), underwent estrogen therapy, received silicone breast implants, and submitted to unsuccessful ‘black market’ testicle-removal surgery.”<sup>160</sup> After being housed in the general male population in the federal penitentiary, she was allegedly beaten and raped by another inmate.<sup>161</sup> In that case, the Court restated the requirements for a violation of the Eighth Amendment in the prison context: “first, the deprivation alleged must be, objectively, ‘sufficiently serious,’ and second, “a prison official must have [had] a ‘sufficiently culpable state of mind.’”<sup>162</sup> In the prison context, the state of mind required for a violation is deliberate indifference.<sup>163</sup> The Court in *Farmer* defined “deliberate indifference” as subjective awareness of a substantial risk of serious harm to an inmate.<sup>164</sup>

Past studies clearly report that placing intersex persons in male prisons has resulted in rape, abuse, and violence.<sup>165</sup> Legal precedent has not explicitly decided whether this constitutes as cruel and unusual punishment. Yet, applying the standard reiterated in *Farmer*, the mere placement of intersex persons in certain prison settings suggests a violation of the Eighth Amendment.<sup>166</sup> If more studies establish the extreme psychological harm resulting from the old

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156. *Id.* at 527–31.

157. *Farmer v. Brennan*, 511 U.S. 825, 828 (1994).

158. *Id.*

159. *Id.*

160. *Id.* at 829.

161. *Id.* at 830.

162. *Id.* at 834.

163. *Id.*

164. *Id.* at 839–40.

165. THE SYLVIA RIVERA LAW PROJECT, *supra* note 71, at 18–19.

166. Rosenblum, *supra* note 55, at 519–20.

housing practices of intersex prisoners, courts will be even more inclined to find a violation of the Eighth Amendment in these cases.<sup>167</sup>

## VI. Prison Housing Solutions

The rarity of intersex persons combined with the lack of case law regarding intersexuality has made it difficult for prison authorities to define proper protocol for how to handle intersex prisoners. In an effort to avoid committing Eighth and Fourteenth Amendment violations, this section examines some guidelines in the treatment and housing of intersex prisoners.

Since many prison authorities are not familiar with intersex persons, it is extremely important that these leaders become familiar with intersexuality and the potential stigmatizing element of intersexuality. At the 2009 Large Jail Network (“LJN”)<sup>168</sup> meeting, Jeanne Nollman spoke about the importance of educating jail staff about intersex conditions.<sup>169</sup>

Many resources indicate that housing should be based on gender identity, rather than on anatomy.<sup>170</sup> Scholars have analyzed housing by gender identity with respect to transgendered women, and still found that it is a feasible alternative for transgendered women, especially if some modifications were made to the current prison housing options.<sup>171</sup>

Critics have argued that the transgendered women’s cellmate might be uncomfortable, and there may be an increase of sexual activity and violence in the women’s prisons.<sup>172</sup> While these concerns may be legitimate or based on fear of the unfamiliar, prison officials could address these concerns by placing nonconforming inmates in a

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167. Nikko Harada, Note, *Trans-Literacy Within Eight Amendment Jurisprudence: De/Fusing Gender and Sex*, 36 N.M. L. REV. 627, 645 (2006).

168. “The National Institute of Corrections (NIC) established the [LJN] in 1989 as a connection point for administrators of jail and jail systems housing 1,000 or more inmates.” Introduction, LARGE JAIL NETWORK PROCEEDINGS, available at <https://s3.amazonaws.com/static.nicic.gov/Library/023878.pdf>.

169. Jeanne Nollman presented about “Intersex and Jail” at the LJN meeting in 2009. Nollman works at Disorders of Sex Development (“DSD”) Discourse, creating awareness of intersex persons. See, e.g., Jeanne Nollman, Meeting Proceedings, *Intersex in the Jail*, LARGE JAIL NETWORK PROCEEDINGS, available at <https://s3.amazonaws.com/static.nicic.gov/Library/023878.pdf>.

170. NATIONAL INSTITUTE OF CORRECTIONS INFORMATION CENTER, LGBTI: LESBIAN, GAY, BISEXUAL, TRANSGENDER, INTERSEX OFFENDERS (SELECTED RESOURCE FOR CRIMINAL JUSTICE PROFESSIONALS) (Mar. 2014), available at <http://static.nicic.gov/Library/026518.pdf>.

171. Rosenblum, *supra* note 55, at 533.

172. *Id.*

“smaller, single bed cell.”<sup>173</sup> The placement in individual cells resolves the discomfort and safety concerns without forcing an individual to enter solitary confinement. While this criticism was analyzed and countered with respect to transgendered women, it also fails to provide a real obstacle to self-identify housing placement for intersex persons. Intersex persons who identify as women, like transgendered women, should also have the option to live in housing in accordance with their gender identity. If prisons focused on a few modifications, they would be able to provide nonconforming people with a more respectful living situation. However, intersex persons are often labeled as a security threat to other female inmates “even [where] there is no indication that such a placement would lead to sexual abuse of another female inmate.”<sup>174</sup>

Another concern with allowing intersex persons to self-identify for their housing placement is the risk of fraud. For example, a male prisoner may be motivated to lie about his gender identity in order to be housed in the female prison. Thus, a prison cannot base a person’s housing solely on a prisoner’s word. Prisons need to take into account the possibility for fraud and abuse of this system. For example, in Shawnee County, Kansas, the county jail has reformed its jail policies to take into account the needs of transgender inmates, while still evaluating if the transgender inmates are being genuine with respect to their identity and needs: “We want to make sure someone isn’t playing the system, but we can’t just throw them in segregation . . . That would be unfair and humiliating.”<sup>175</sup> Prisons, like the Shawnee County Jail, can also address the concern for fraud by establishing a team of medical experts and professionals who evaluate the sincerity of the individual’s self-identification.

The Transgender Law Center advocates for California prisons to use individual assessment to determine the risk factors associated with prisoners becoming the target of sexual victimization.<sup>176</sup> While the Transgender Law Center specifies only lesbian, gay, bisexual, and transgender people in their recommendations, the same considerations also apply to intersexual people who may also be at

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173. *Id.*

174. See GREENBERG, *supra* note 4, at 77.

175. Aly Van Dyke, *Shawnee County Jail Works to Improve Conditions for Transgender Inmates: Inmate Process, Housing Arrangements Altered at Shawnee County Jail*, THE TOPEKA CAPITAL JOURNAL, Dec. 29, 2013, available at <http://cjonline.com/news/2013-12-29/shawnee-county-jail-works-improve-conditions-transgender-inmates>.

176. *Policy Recommendations Regarding LGBT People in California Prisons*, TRANSGENDER LAW CENTER, <http://transgenderlawcenter.org/issues/prisons/policy-recommendations-regarding-lgbt-people-in-california-prisons>.



high risk for abuse. Further, the Transgender Law Center recommends that California prisons provide these prisoners with single cells when available or separate units for all detainees who are at high risk of being targets for sexual assault.<sup>177</sup>

Due to the high threat of violence and abuse targeted at intersex prisoners, placement of intersex prisoners in women's units is often preferable. Further, Nollman commented that "women inmates tend to be less cruel and intolerant than men."<sup>178</sup> Thus, she concluded that "housing intersex inmates in a women's unit may often be the better choice."<sup>179</sup>

Another option that prison authorities have explored is the creation of a separate housing area for people who are transgender, lesbian, gay, bisexual, or the intersex.<sup>180</sup> The New York City jail system has separate housing for gay inmates, and can be used as a model for prisons systems that want to provide a separate housing option for nonconforming persons.<sup>181</sup> This solution would be beneficial for intersex prisoners because they would be able to express their gender identity in a presumably safer environment.<sup>182</sup>

While critics find this problematic because of the cost associated with housing intersex prisoners in separate units, "[t]his solution would cost little more than the dedication of a separate ward for this purpose, a cost that would obviously affect smaller prison systems more than those with numerous transgendered prisoners."<sup>183</sup> In situations where a prison does not have enough resources to set up a separate ward for transgendered, intersex, bisexual, homosexual individuals, states "could pool resources with other jurisdictions to provide joint resources."<sup>184</sup>

Given the difficulty of placing intersex persons in male or female housing and separate housing, some have advocated for the return of co-ed facilities.<sup>185</sup> These facilities were established as a result of the inequity in resources and sheer lack of facilities for female

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177. *Id.*

178. Jeanne Nollman, Meeting Proceedings, *Intersex in the Jail*, LARGE JAIL NETWORK PROCEEDINGS, available at <https://s3.amazonaws.com/static.nicic.gov/Library/023878.pdf>.

179. *Id.*

180. Rosenblum, *supra* note 55, at 534.

181. *Id.* at 535.

182. *Id.* at 534-35.

183. *Id.* at 535.

184. *Id.*

185. Dean Spade, *Documenting Gender*, 59 HASTINGS L.J. 731, 811 (2007-2008).

prisoners.<sup>186</sup> States who have experimented with this housing option have had positive results: “Recidivism rates of prisoners at Fort Worth were remarkably low. Violence within the facility, especially amongst men and including sexual assault, was significantly reduced. Pregnancy rates amongst women at the facility were also lower than at all-women institutions.”<sup>187</sup> As a result of these studies, some scholars argue that inmate supervision, rather than inmate segregation, is the best indicator of inmate security and vulnerability in the prison system.<sup>188</sup>

In addition to physical housing, prison authorities should treat intersex persons in accordance with their individual gender expression. For example, the Chicago Police Department issued guidelines on how to interact with transgender, intersex, and gender nonconforming individuals.<sup>189</sup> In providing examples of how the police officers could treat these individuals with respect, the guidelines discussed the importance of proper pronouns.<sup>190</sup> For example, they should use pronouns that conform to the intersex person’s self-identity.<sup>191</sup> When there are ambiguities, staff should ask the intersex person for his or her preference.<sup>192</sup> These guidelines established for the Chicago Police Department should also apply in the prison context.

### Conclusion

Although the court did not analyze this equal protection claim under intermediate scrutiny, precedent supports interpreting intersex discrimination as sex-based discrimination. Prisons, as they currently exist, are not equipped to handle the complexity of intersex prisoners. The perceived rarity of intersex persons combined with the ambiguities of sex has made it difficult for prisons to establish clear guidelines. The lack of rules and training for prison guards have led to poor housing decisions and treatment of intersex persons. While

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186. *Id.*

187. *Id.*

188. Chinyere Ezie, *Deconstructing the Body: Transgender and Intersex Identities and Sex Discrimination—the Need for Strict Scrutiny*, 20 COLUM. J. GENDER & L. 141, 190 (2011).

189. *Interactions with Transgender, Intersex, and Gender Nonconforming (TIGN) Individuals: General Order G02-01-03*, CHICAGO POLICE DEPARTMENT (Aug. 21, 2012), <http://directives.chicagopolice.org/directives/data/a7a57b38-1394a4ae-75313-94a4-b606a68cfab99615.html?hl=true>.

190. *Id.*

191. *Id.*

192. *Id.*

only one intersex prisoner has actually challenged the constitutionality of her housing treatment, the district court and appellate court in that case acknowledged that the prison could have better accommodated the intersex prisoner.<sup>193</sup> The courts can further improve and protect the individual rights of intersex persons by applying heightened scrutiny to equal protection claims dealing with classifications of intersex persons.

Some prisons are experimenting with co-ed facilities that place less emphasis on the binary structure of male or female, or separate wards for prisoners with nonconforming genders. Even more progressive, there is growing support among scholars for self-identification to govern housing placement. However, current biases and stigmatization of intersex persons provide challenges to this option. As shown in the case of DiMarco, as the law currently stands, intersex persons face many challenges in the prison system with seemingly little legal recourse for potential abuse unless they can overcome the high burden of “deliberate indifference.”

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193. *DiMarco*, 300 F. Supp. 2d at 1195; *DiMarco*, 473 F.3d at 1333–44.